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Chapter 15: Workmen's Compensation

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CHAPTER 15

Workmen's Compensation

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§15.1. Injuries covered by Workmen's Compensation Act. A basic tenet of the Massachusetts Workmen's Compensation Act is that for an injury to be compensable, it must arise "out of and in the course of . . . employment."[1] This concept has been subject to more litigation than has any other area of workmen's compensation law. In *Rupp's Case*,[2] the Supreme Judicial Court extended the scope of this principle to include injuries sustained by an employee when her employer suggested that she go home during regular working hours because of a severe snowstorm.

The employee worked for a nursing association. In the course of her daily visits she often used a car owned by her employer. On the day of the accident, there was a large snow storm. Her employer suggested to her that she leave the car at a garage and walk home. The employee was told that she would be on call until her usual quitting time. She sustained her injuries when she slipped while walking from the garage to her home. A single member of the Industrial Accident Board found that this trip was not part of the business of the employer and that, therefore, the injury received while returning from work was not compensable.[3] The Superior Court reversed. On appeal by the insurer, the Supreme Judicial Court sustained the Superior Court finding. The Court held that inasmuch as the claimant was on call until the end of her usual working hours, it was clear that her day's work-activity had not been completed. She was on her way home at the specific direction of the employer, and she was to remain there until her usual working hours had passed. Her activity at the time of the injury, therefore, was in the course of her employment and was compensable.

§15.2. Street risk: Serious and willful misconduct of employee. General Laws, Chapter 152, Section 26, grants to the employee the right to compensation for personal injuries "arising out of an ordinary risk of the street while actually engaged, with his employer's au-

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§15.1. [1] G.L., c. 152, §26.

[2] 1967 Mass. Adv. Sh. 993, 227 N.E.2d 329.

[3] See Rourke's Case, 237 Mass. 360, 363-364, 129 N.E. 603, 604, 13 A.L.R. 546, 548-549 (1921).

thorization, in the business affairs or undertakings of his employer. . . ." The Supreme Judicial Court held this section of the statute applicable in *Caron's Case*.[1]

The employee, who was killed in the accident resulting in this claim, was instructed by his immediate superior to attend an evening dinner meeting several miles from his home. The employee arrived at his destination at 6:30 P.M. The dinner meeting ended at 9:00 P.M., but the employee remained after the others had left to continue a conversation about business matters with his superior, a conversation that had commenced during the dinner. Throughout the evening he had several drinks. At 12:05 A.M., while en route home, the accident occurred. Both the single member and the Review Board found that the accident occurred while the employee was in the course of his employment. The insurer challenged this finding.

In affirming the Board's finding, the Supreme Judicial Court held that Section 26 supports alternative theories upon which compensation can be based. Either the employee must be injured in a situation arising out of and in the course of his employment or, alternatively, in an accident arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer. The Court read the Board's finding to be based on this latter alternative. The Court reasoned that the nature of the employee's business trip — Caron was required to remain as long as he did — indicated that his trip home could reasonably be found to have been an essential part of his mission. The Court found it unnecessary to pass on the merits of the insurer's contention that Caron's drinking might have been a defense as willful misconduct on the part of the employee under Section 27 of the Workmen's Compensation Act.[2]

§15.3. Employees in residence on the employer's premises. With the exception of hospital employees, it is not usual today for employees to reside on the premises of their employers. Nevertheless, cases relating to such residency have often led to litigation because the employee who resides at his employer's home or business establishment is often on these premises during non-working hours. If he is injured during this time, difficult factual questions arise as to whether the accident would be compensable.

In *Kilcoyne's Case*,[1] the employee was an attendant nurse at a state school. The school maintained a limited number of rooms which could be used by selected employees as living quarters. The employees' manual specifically stated that such quarters were assigned to the employees "for the convenience of the institution. . . ." The employer charged a nominal rent for the room. Although it did not require that

§15.2. [1] 351 Mass. 406, 221 N.E.2d 871 (1966).

[2] G.L., c. 152, §27, reads: "If the employee is injured by reason of his serious and willful misconduct, he shall not receive compensation; but this provision shall not bar compensation to his dependents if the injury results in death."

§15.3. [1] 1967 Mass. Adv. Sh. 895, 227 N.E.2d 324.

these resident employees perform any tasks while off duty, the employee stated that he did feel compelled to be as cooperative as possible as he was living on the premises for such a nominal rent. The employee was injured on his day off when he fell while walking up the steps to his room, conveying groceries for himself.

The single member of the Industrial Accident Board found that the accident arose out of and in the course of employment. His finding was adopted by the Review Board and by the Superior Court, and was sustained by the Supreme Judicial Court.

The fact that an employee is on the premises of his employer at the time he is involved in an accident does not automatically make injuries from such an accident compensable. There must be some relationship between the incident and the employment. Nevertheless, there is authority for the proposition that injuries on the employer's premises may give rise to compensation even though the injury did not occur during regular work hours.[2] In the case at bar, the employer challenged the employee's claim on the grounds that there was no continuity of employment, as the employee had no obligation whatsoever to be on the premises at the time.

The Court found that the employee resided on the premises, even without stated obligations, for the employer's benefit. The nominal room rent and the immediate availability of the employee to assume emergency responsibilities, though he was not required to do so, were factors sustaining this conclusion. In light of this finding, compensation was undeniably in order. The Court could further have based its decision on the statement in the hospital manual that employees were assigned to living quarters on the premises "for the convenience of the institution. . . ."

This case should not be read as broadening the resident-employee compensation rule in Massachusetts. Generally, compensation is limited to those resident-employees who are continuously on call, and who are required to live on the employer's premises,[3] or those whose residence on the employer's premises is required by practical considerations such as the unavailability of suitable accommodations within a reasonable distance from the place of employment.[4] While the case at bar does not fall into any of these classifications, the Court has clearly found a definite relationship between the residence and the employment. Where the residence exists for the benefit of the employer and circumstances effectively require that the employee accede to performing tasks off duty, then the Court will find that a right to compensation arises.

§15.4. Findings by the Industrial Accident Board: Jurisdiction of the Superior Court. In *Ritchie's Case*,[1] the findings of the Board in-

2 See Horon's Case, 346 Mass. 128, 190 N.E.2d 399 (1963); Warren's Case, 326 Mass. 718, 97 N.E.2d 184 (1951).

3 E.g., Doyle's Case, 256 Mass. 290, 152 N.E. 340 (1926).

4 See Souza's Case, 316 Mass. 332, 55 N.E.2d 611 (1944).

§15.4. 1 351 Mass. 495, 222 N.E.2d 687 (1966).

dicated that the claimant, an 83-year-old man who was president and treasurer of the insured corporation, was injured when he stumbled while coming into his office. The stumbling occurred when he bent forward to pat a cat. The single member held that the injury was compensable. The Board reversed this decision and held that the injury was not a personal injury arising out of and in the course of employment. The Superior Court reversed the finding of the Board and adopted that of the single member. The Supreme Judicial Court, in reversing the Superior Court, held that the Superior Court had no power to reverse the Board and rely upon the finding of the single member, unless it could be shown that the Board's determination was either unsupported by the evidence or based upon an error of law.[2]

§15.5. **Proximate cause: Expert medical opinion.** An injury may be compensable under the Workmen's Compensation Act only after the claimant has established a causal connection between the employment and the injury.[1] Advances in medical techniques have enabled doctors to attribute more remote illnesses to work-connected injuries. Thus, claims of industrial cancer and industrial heart attacks, once the province of speculation, are today the basis of numerous recoveries.[2] Despite these cases, however, the burden continues to remain with the claimant to show a causal relationship between the work-connected injury and the more remote illness. In *King's Case*,[3] the Supreme Judicial Court reversed the decision of the Review Board, which had been sustained by the Superior Court, on the grounds that the claimant failed to produce sufficient evidence to prove the requisite connection between injury and illness.

In April 1959, the employee fell off a truck injuring his left side and back. The company physician strapped his back and the next day he returned to his job. He continued working until December 1959, but during this period experienced back pain. Starting in September, he went to several physicians, receiving a variety of treatments. None of them alleviated the pain. Late in December, X-rays revealed a streaking on his left lung. In March 1960, the lung was removed with a definite diagnosis of cancer. After unsuccessful treatment, he died in August of the same year. "The cause of death was determined to be cancer which had originated in his pancreas and spread metastatically to other parts of his body."[4]

Reversing the finding of the single member, the Board found that at the time of the injury the employee had cancer of the pancreas which had not yet metasticized, and that the fall dislodged some of the cancer cells which eventually spread to the rest of his body causing the ensuing illness and death. The Superior Court affirmed.

2 See DiGiovanni's Case, 255 Mass. 241, 242, 151 N.E. 91, 92 (1926).

§15.5. 1 See Dulinsky's Case, 307 Mass. 427, 429, 30 N.E.2d 215, 216 (1940).

2 See Bonin, Comments on Recent Important Workmen's Compensation Cases, 24 NACCA L.J. 134, 139 (1959); Page, Workmen's Compensation Law, Reviews of Leading Cases, 26-27 NACCA L.J. 223, 265 (1960-1961).

3 1967 Mass. Adv. Sh. 789, 225 N.E.2d 900.

4 Id. at 790, 225 N.E.2d at 901.

The Supreme Judicial Court noted that the sole question before them was whether the evidence supported the finding of causal relationship. It cannot be disputed that the deterioration of health subsequent to the accident and the occurrence of cancer symptoms at the same time were alone insufficient to establish this causal relationship. The claimant attempted to establish this causal relationship through the testimony of a specialist in internal medicine and cardiovascular diseases. While the doctor's opinion substantiated the claim, it was based exclusively upon a review of the medical records since he had never treated or examined the claimant. The doctor did state that the cancer could possibly have originated after the accident. He thought, however, that this was unlikely.

The Court reversed the Review Board's grant of compensation on the grounds that the claimant had failed to establish the causal relationship by a preponderance of the evidence. The Court viewed the doctor's opinion as expressing "no more than a mathematical likelihood that the employee's death was causally related to his accident."[5] The claimant could not carry his burden to establish causation and, thus, had to fail.

While the propositions of law stated by the Court are correct, it is submitted that their reversal of the Review Board and the Superior Court in this case was without their scope of review. It appears from the evidence that the trier of facts could have reasonably made the decision which was made by the Review Board. If the resolution of factual controversies is within the broad latitude of power given to the Review Board, then the reversal was not in order. Certainly there was sufficient evidence to sustain the finding, even if, as trier of the facts, the Supreme Judicial Court might have found otherwise.

Gannon's Case[6] also involved the probative value of expert medical testimony. In this case, the final determination of the Review Board in favor of the claimant was based upon the testimony of three expert witnesses, all of whom had examined the claimant several years subsequent to his alleged injuries and had testified that the injuries complained of could have stemmed from the accidents as described by the employee. The only evidence presented by the claimant to prove that the compensable injuries had occurred were these reports made several years subsequent to the time of the original injuries. The employer contended that since the medical records made at the time of the alleged injuries contained no reference to them, there was not sufficient evidence of such injuries to warrant an expert opinion that the disabilities were causally related to the alleged injuries.

The Court found that while the Board certainly could take into consideration the fact that the employee had not informed his physicians at the time of the alleged injuries, this did not give a basis to eliminate all expert testimony. Expert medical opinion need not relate only to records made at the time of the injury. The expert may

[5] Id. at 792, 225 N.E.2d at 902; see Sargent v. Massachusetts Accident Co., 307 Mass. 246, 250, 29 N.E.2d 825, 827 (1940).

[6] 1967 Mass. Adv. Sh. 891, 227 N.E.2d 352.

base his conclusions "upon facts assumed in the questions put to him and supported either by admitted facts or by the testimony of other witnesses already given. . . ."[7]

§15.6. Recommittal to Industrial Accident Board: Impartial physicians. Section 9 of the Workmen's Compensation Act provides for impartial medical examinations of claimants by Board-appointed physicians.[1] One such report in *DaLomba's Case*[2] was stricken because the examining physician had been involved in more than three workmen's compensation matters within twelve months prior to the time he examined the claimant.[3] At the same hearing at which this report was stricken, another report, damaging to the employer's case, was admitted. Pursuant to Industrial Accident Board Rule IV-9,[4] the employer made a reasonable request for an opportunity to rebut the medical report. The Review Board's denial of this request was affirmed by the Superior Court.[5]

The Supreme Judicial Court reversed the decision of the Review Board and held that Rule IV-9 implicitly requires that the Board "not deny such rebuttal if the request is received within seven days of the mailing of the reports."[6] The Court felt that "It would be manifestly unfair to deprive a party, who seasonably requests it, an opportunity to rebut such a report."[7]

§15.7. Liability in person other than insured. General Laws, Chapter 152, Section 15, outlines the procedures which must be followed if an employee elects to bring an action against someone other than the employer.[1] A series of Massachusetts cases has interpreted

7 Commonwealth v. Russ, 232 Mass. 58, 73, 122 N.E. 176, 182 (1919).

§15.6. 1 G.L., c. 152, §9, states: "The division or any member thereof, may appoint a duly qualified impartial physician to examine the injured employee and to report."

2 1967 Mass. Adv. Sh. 927, 227 N.E.2d 513.

3 "No person shall qualify or remain qualified as an impartial physician who has testified in hearings under this chapter more than three times in the preceding twelve months, for either insurers or claimants or both unless by agreement of both parties. A report by a physician appointed as an impartial physician under this section, who at the time of his examination of the injured employee, shall have testified in hearings under this chapter more than three times in the preceding twelve months for either insurers or claimants or both, unless by agreement of both parties, shall be null and void and not admissable as evidence." G.L., c. 152, §9.

4 Rule IV-9 reads: "The division or member may decline to allow rebuttal of reports of impartial physicians where request for such rebuttal is received later than seven days after mailing of such reports." 1967 Mass. Adv. Sh. at 931, 227 N.E.2d at 517.

5 Id. at 929, 227 N.E.2d at 515.

6 Id. at 931, 227 N.E.2d at 517.

7 Id.

§15.7. 1 "Where the injury for which compensation is payable is caused under circumstances creating a legal liability in some person other than the insured to pay damages in respect thereof, the employee may at his option proceed either at law against the person to recover damages or against the insurer for compensation under this chapter."

this section to mean that "some person other than the insured" does not include a co-employee or fellow servant.[2] If an employee is responsible for an injury, the employer must be held responsible. Once the employer is so involved, then the workmen's compensation statute must be invoked. This was not necessarily true at common law and is not the rule of interpretation universally given to all such statutes, but there is little room for disputing the existence of this doctrine in Massachusetts.

The question then becomes one of factual interpretation: whether the two parties involved were co-employees at the time of the accident. The mere fact that two parties work for the same employer does not necessarily make them co-employees for purposes of Section 15. In *Comeau v. Herbert*,[3] the defendant had left the shop where he worked fifteen minutes prior to the accident and had begun driving home. The defendant's car struck the plaintiff approximately twenty feet from where the car had been parked in an area located between two of the employer's mills. The record did not clearly establish that the injury occurred on the employer's premises. At the time of the accident, the plaintiff, a carpenter, was walking from one of his employer's shops to another.

The Supreme Judicial Court, sustaining the plaintiff's exceptions to the Superior Court's entry of a verdict for the defendant after a jury verdict for the plaintiff, found that there was sufficient evidence to sustain a finding that the defendant was no longer a co-employee of the plaintiff at the time of the accident. Thus, the plaintiff was not limited in his remedies to the workmen's compensation statute.

In *DeSisto's Case*,[4] the Supreme Judicial Court further discussed the scope of Section 15. On March 20, 1961, DeSisto, an insurance agent, slipped and fell on ice which had accumulated on the premises of a policyholder. The employer filed a detailed report of the accident with its insurer on March 30. On April 5, an adjuster for the insurance carrier spoke with the claimant's attorney who advised him that the employee intended to proceed against the owner of the building. On April 25, however, the employee filed a claim for compensation. Because the employee failed to give written notice of the accident to the owner of the building within thirty days of the fall, as required by General Laws, Chapter 84, Section 21, his right of action against the owner was extinguished on the date of the claim for compensation. The insurer, in effect arguing that the payment of compensation to the employee was dependent upon its ability to bring a third party action,[5] refused compensation on the grounds that the employee was

2 Murphy v. Miettien, 317 Mass. 633, 59 N.E.2d 252 (1945); Carlson v. Dowgielewicz, 304 Mass. 560, 24 N.E.2d 538 (1939); Clark v. M. W. Leahy Co., 300 Mass. 565, 16 N.E.2d 57 (1938); Caira v. Caira, 296 Mass. 448, 6 N.E.2d 431 (1937); Dresser v. New Hampshire Structural Steel Co., 296 Mass. 97, 4 N.E.2d 1012 (1936); Bresnahan v. Barre, 286 Mass. 593, 190 N.E. 815 (1934).

3 1967 Mass. Adv. Sh. 967, 227 N.E.2d 475.

4 351 Mass. 348, 220 N.E.2d 923 (1966).

5 Id. at 351, 220 N.E.2d at 925.

precluded from recovery because he had failed to give the notice required by statute, and, further, that he was estopped from claiming compensation because of the representation made to the carrier that he was going to proceed against the third party.

The Supreme Judicial Court held that, while Section 15 provides for the employee's right of election, the election only takes place when the action is either brought against the third party in tort or when the employee reaches a settlement without bringing an action. The reason for this statute is to prevent the employee from obtaining double compensation, but it should in no way be construed to preclude him from enforcing his rights. The Court stated that the Workmen's Compensation Act's "statutory objective of protection for the employee takes precedence over any right of the insurer against third parties."[6]

A claim of estoppel would be valid only if the employee's representation had been designed to induce a course of action on the part of the carrier. Here the Court found it was not. Nothing done by the employee precluded the carrier from protecting its rights by giving notice to the owner of the building.

§15.8. **Interest: Retroactive effect of statute.** In *Murphy's Case*,[1] the Supreme Judicial Court considered whether a 1965 amendment[2] to Section 50 of the Workmen's Compensation Act had retroactive effect.[3] The amendment made interest on a final decree payable from the date of the filing of the claim, while the statute previously made interest payable only from the date when the board promulgated a decision on the claim, Murphy had filed his claim before the enactment of the amendment, but the final decree awarding compensation was entered subsequent thereto.

In considering the retroactive effect of the amendment, the Court relied on Section 2A[4] of the act which states that an amendment to the chapter increasing compensation is considered substantive in nature and applies only to injuries occurring after the effective date of the amendment, unless otherwise expressly provided. An amendment not increasing compensation is treated as procedural or remedial and applies to all claims pending at the time of the enactment, regardless of the date of their occurrence. The Court held interest to be

[6] Id.

§15.8. [1]1967 Mass. Adv. Sh. 485, 224 N.E.2d 462.

[2] Acts of 1965, c. 616.

[3] G.L., c. 152, §50, reads: "Whenever compensation is not paid within sixty days of notice to the insurer that compensation is claimed to be due an injured employee or his dependents, and there are one or more hearings on any question involving the said compensation, including appeals, and the decision is in favor of the employee or his dependents, interest at the rate of six per cent per annum from the date of the receipt of the notice of the claim by the board to the date of payment shall be paid by the insurer on all sums due as compensation to such employee or his dependents. Whenever such sums include weekly payments, interest shall be computed on each unpaid weekly payment."

[4] G.L., c. 152, §2A.

compensation within the meaning of Section 2A. Therefore, the amendment could not be applied retroactively.

§15.9. **Appeal of Board decision discontinuing compensation.** In *Longerato's Case*,[1] the employee sustained a back injury while employed by employer X. She claimed and received compensation for several months subsequent to the injury. After quitting her job with employer X, she accepted a position with employer Y. While working for employer Y, she sustained an injury which, she claimed, aggravated the pre-existing injury. The claimant then filed a claim for compensation relating to this second incident. The Review Board denied compensation both against the insurer of employer X for further compensation as a result of continuing effects of the original injury and also against employer Y as a result of the second, aggravating injury. Ten months after this hearing, a second hearing was held at which the insurer of employer X was ordered to pay further compensation for the period subsequent to the second injury. The insurer appealed and the Superior Court reversed the Board's determination.

In reinstating the Board's decision, the Supreme Judicial Court found that the second hearing held by the Board was proper under Section 12 of the Workmen's Compensation Act.[2] The Court further stated that under Section 12 there need not be a formal appeal from a Board order discontinuing compensation. The employee's right to rehearing is automatic.[3] The decision of the first Board was, however, res judicata as to employer Y. The Court's decision in *Longerato* comports with the clear language of Section 12 and it is difficult to conceive of the Court reaching a different result.

§15.9. 1 1967 Mass. Adv. Sh. 549, 225 N.E.2d 356.

2 G.L., c. 152, §12, reads, in pertinent part: "When in any case before the board it appears that compensation has been paid under an agreement of the parties or when in any such case there appears of record a finding that the employee is entitled to compensation, no subsequent finding by the board or by a member thereof discontinuing compensation on the ground that the employee's incapacity has ceased shall be considered final as a matter of fact or res judicata as a matter of law, and such employee or his dependents, in the event of his death, may have further hearings as to whether his incapacity or death is or was the result of the injuries for which he received compensation.

3 1967 Mass. Adv. Sh. at 550-551, 225 N.E.2d at 358.